Messrs Roland Cheng & Co v Konkamaju Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–3085 OF 2011

B

RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABDUL RAHIM JJCA

17 MAY 2012

C

Civil Procedure — Res judicata — Decision on merits — Whether solicitor entitled to lien over client's title deed to land — Whether similar issue raised in earlier interpleader proceedings — Whether merits of solicitor's claim for lien determined during interpleader proceedings — Whether res judicata not applicable

D

Legal Profession — Solicitors — Solicitor's lien — Solicitor withholding original title deed due to unpaid legal fees — Whether solicitor entitled to lien to retain original title deed — Advocates Ordinance Sabah 1953 (Sabah Cap 2) s 55

E

The plaintiffs had purchased a property ('the property') from defendant/respondent and had paid the purchase price in full. The defendant, a developer, was a joint venture partner of the original landowner. The third party/appellant was the original landowner's solicitors in an originating summons matter ('the said OS'). The original landowner had deposited the title deed to the property with the third party pending resolution of the said OS. The original landowner had failed to settle the legal fees owing to the third party in relation to the said OS. Therefore the third party argued that it had a lien over the title deed pending settlement of his legal fees. In a third party interpleader application made pursuant to O 17 r 3 of the Rules of the High Court 1980 ('RHC'), the third party sought an order that the defendant to pay the third party legal fees of RM20,099.18 to discharge the third party solicitor's lien on the title deed. But the application was dismissed by the deputy registrar on the ground that the defendant was under no liability to make payment to the third party. The issues arising in this appeal were: (i) whether the third party had a solicitor's lien over the title deed; and (ii) whether the third party was estopped from claiming a solicitor's lien over the title deed and accordingly res judicata applied to the third party in the light of the deputy registrar's decision dismissing the third party's interpleader summons. The High Court judge ('judge') allowed the defendant's claim against the third party for an injunction to compel the third party to produce and deliver the title deed to the plaintiffs on the grounds that the plaintiffs had the right of possession over the title deed.

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I

A The judge also held that the third party could not claim a solicitor's lien. The third party appealed against that decision.

Held, allowing the appeal with costs:

B (1) The third party could claim a solicitor's lien over the title deed which was in their possession. That was the only way the third party could protect its interest with regard to the payment of its legal fees by the original landowner for services rendered to the original landowner in relation to the said OS. This was particularly so when the title deed was still C registered in the name of the original landowner (see para 24).

(2) At common law a solicitor has a right or lien to retain property in his possession until he is paid costs due to him in his professional capacity (see para 25). *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161 referred.

D

(3) Section 55 Advocates Ordinance Sabah 1953 (Sabah Cap 2) is sufficiently wide to allow a solicitor in Sabah to have a lien over a document of title belonging to a client until his legal fees are fully paid (see para 27).

E (4) There was no decision on the merits of the third party claim of solicitor's lien on the title deed being made by the deputy registrar in dismissing the interpleader summons. In other words, the merits of the solicitor's lien as claimed by the third party was never at any stage determined by the court. Therefore, the judge had erred when he concluded that the third party F could not claim a solicitor's lien over the title deed as it was res judicata by reason of the deputy registrar's decision (see para 34).

(5) The solicitor's lien claimed by the third party on the title deed was possessory in nature. Therefore, on the facts and circumstances of this G case, the third party would have lost its possessory lien on the title deed if the third party was to part with the title deed (see para 39); *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45.

[Bahasa Malaysia summary

H Plaintif telah membeli hartanah ('hartanah') daripada defendan/responden dan telah membayar harga pembelian sepenuhnya. Defendan, pemaju, merupakan rakan kongsi usaha sama pemilik tanah asal. Pihak ketiga/perayu adalah peguam pemilik tanah asal dalam saman pemula ('SP') tersebut. Pemilik tanah asal telah mendepositkan surat ikatan hak milik kepada hartanah dengan I pihak ketiga sementara menunggu resolusi SP tersebut. Pemilik tanah asal telah gagal untuk menjelaskan yuran guaman terhutang kepada pihak ketiga berhubung dengan SP tersebut. Oleh itu pihak ketiga berhujah bahawa mereka mempunyai lien atas surat ikatan hak milik sementara menunggu penyelesaian yuran guamannya. Dalam permohonan interplider pihak ketiga dibuat

menurut A 17 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), pihak ketiga memohon perintah agar defendan membayar yuran guaman pihak ketiga sebanyak RM20,099,18 untuk melepaskan lien peguamcara pihak ketiga pada hak milik hartanah. Tetapi permohonan itu ditolak oleh timbalan pendaftar atas alasan bahawa defendan tiada sebarang liabiliti untuk membuat bayaran kepada pihak ketiga. Isu-isu yang timbul dalam rayuan ini ialah: (i) sama ada pihak ketiga mempunyai lien peguam atas surat ikatan hak milik; dan (ii) sama ada pihak ketiga diestop daripada menuntut lien peguam atas surat ikatan hak milik dan sewajarnya res judicata terpakai kepada pihak ketiga berdasarkan keputusan timbalan pendaftar menolak saman interplider pihak ketiga. Hakim Mahkamah Tinggi ('hakim') membenarkan tuntutan defendan terhadap pihak ketiga bagi mendapatkan injunksi untuk memaksa pihak ketiga untuk mengeluarkan dan menyerahkan surat ikatan hak milik kepada plaintif atas alasan bahawa plaintif mempunyai hak pemilikan atas surat ikatan hak milik. Hakim juga memutuskan bahawa pihak ketiga tidak boleh menuntut lien peguam. Pihak ketiga merayu terhadap keputusan itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pihak ketiga boleh menuntut lien peguam atas surat ikatan hak milik berada dalam milikan mereka. Itu adalah satu-satunya cara pihak ketiga boleh melindungi kepentingannya dengan mengambil kira kepada bayaran guamannya oleh pemilik tanah asal bagi perkhidmatan yang diberikan kepada pemilik tanah asal berhubung dengan SP tersebut. Ini khususnya terjadi apabila surat ikatan hak milik masih didaftarkan atas nama pemilik tanah yang asal (lihat perenggan 24).

(2) Menurut 'common law' seorang peguamcara mempunyai hak atau lien untuk mengekalkan harta dalam milikannya sehingga dia dibayar kos yang perlu dibayar kepadanya dalam kapasiti profesionalnya (lihat perenggan 25). *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161 dirujuk.

(3) Seksyen 55 Ordinan Peguam Sabah (Sabah Bab 2) adalah cukup luas untuk membenarkan peguamcara di Sabah mempunyai lien atas dokumen hak milik kepunyaan anakguam sehingga yuran guamannya dibayar sepenuhnya (lihat perenggan 27).

(4) Tiada keputusan mengenai merit tuntutan pihak ketiga atas lien peguamcara pada surat ikatan hak milik yang dibuat oleh timbalan pendaftar dalam menolak saman interplider itu. Dalam erti kata lain, merit lien peguam seperti yang didakwa oleh pihak ketiga tidak pernah di mana-mana peringkat telah ditentukan oleh mahkamah. Oleh itu, hakim telah terkhilaf apabila beliau membuat kesimpulan bahawa pihak ketiga tidak boleh menuntut lien peguam atas surat ikatan hak milik kerana ia adalah res judicata atas sebab keputusan timbalan pendaftar (lihat perenggan 34).

(5) Lien peguam yang dituntut oleh pihak ketiga pada surat ikatan hak milik adalah bersifat pemilikan. Oleh itu, atas fakta dan keadaan kes ini, pihak ketiga akan kehilangan pemilikan lien atas surat ikatan hak milik sekiranya pihak ketiga melepaskan surat ikatan hak milik tersebut (lihat perenggan 39); *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45.]

Notes

For cases on res judicata in general, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7131–7274.

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor [2000] 1 MLJ 466, CA (refd)

Letchumanan a/l Gopal (representatives for the estate of Rajammah a/p Muhusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788, CA (refd)

TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45, FC (refd)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479, CA (refd)

Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) [2011] 4 MLJ 161, CA (refd)

Legislation referred to

Advocates Ordinance Sabah 1953 (Sabah Cap 2) s 55
Limitation Ordinance of Sabah (Cap 72) Schedule, Items 37, 97
Rules of the High Court 1980 O 17 r 3

Appeal from: Suit No K22–156 of 2009–III (High Court, Kota Kinabalu)

Roland Cheng (Roland Cheng & Co) for the appellant.
Brendan Soth (Ronny Cham & Co) for the respondent.

Abdul Aziz JCA (delivering judgment of the court):

INTRODUCTION

[1] On 15 November2011 Justice Abdul Rahman Sebli, Judge of the High Court of Sabah and Sarawak sitting at Kota Kinabalu allowed the respondent's (ie the defendant before the High Court) claim against the appellant (ie the third party before the High Court) for an injunction to compel the appellant to produce and deliver the title country lease No 215398557 ('the title deed') to the plaintiffs (who are the purchasers in the action and the plaintiffs before the High Court but not a party to this appeal) within 30 days from the date of the

order with cost to be taxed between the plaintiffs and the defendant in the High Court. The learned High Court judge also allowed the respondent's claim that the respondent be fully indemnified by the appellant against liability in respect of the first and second plaintiffs claim for costs and damages, if any.

[2] The reason given by the learned High Court judge is that the plaintiffs have the right of possession over the document of title and it is the defendant's responsibility to deliver the same to the plaintiffs as stipulated in cl 11 of the sale and purchase agreement. The learned High Court judge also said that it is no defence for the defendant to say that the title is in the possession of the third party or that the plaintiffs have full knowledge of this fact. The learned Judge also allowed the defendant's third party claim on the ground that the third party cannot claim a solicitor's lien over the deputy registrar's decision dated 6 August 2010 and that it is not the defendant's duty to discharge the solicitors lien of the third party over the document of title.

[3] This is the third party's appeal against that decision. In this appeal the appellant shall be referred to as the 'third party' and the respondent as the 'defendant' unless otherwise stated. Reference to 'plaintiff is a reference to the plaintiff in the action before the High Court.

[4] On 17 May 2012, having heard counsels and having read the appeal records we allowed the third party's appeal with cost of RM10,000 to the appellant ie the third party and set aside the High Court Order dated 15 November 11.

THE FACTS OF THE CASE

[5] The plaintiffs were and at all material times the legal and beneficial owners of Lot No 3 Block 34B, Bandar Penampang Phase 2b, Mile 5 1/2 Penampang Road Kota Kinabalu, Sabah ('the property') held under the original document of title deed. The plaintiffs had purchased the property from the defendant pursuant to a sale and purchase agreement ('the said sale and purchase agreement') dated 19 December 2003. The purchase price for the property was RM405,000 and the plaintiffs have paid the purchase price to the defendant in full.

[6] At all material times the defendant was a company registered in Malaysia with its registered address at Wisma Damai Kota Kinabalu and was carrying on a business as land developer.

[7] In it's statement of claim against the third party, the defendant claimed that it was a joint venture partner of Syarikat Batu Bata Koidupan Sdn Bhd ('the landowner') by virtue of a joint venture agreement dated 2 May 1992 ('the

JV agreement'). The defendant further claimed that by virtue of the JV agreement and a deed of assignment dated 30 March 2000 ('the deed of assignment') the defendant was entitled to sell the property to the plaintiffs. The defendant also averred that by letters dated 9 May 2003 and 13 May 2003 respectively (the letters), the landowner instructed the third party to release all the titles (36 titles all together including the original title deed to the property) held by the third party as solicitors for the landowner, to Messrs Ronny Cham & Co the defendant's solicitors. The defendant alleged that the third party released all the titles except two. One is the original title deed to the property. The other is the original title deed under country lease No 215398682 to Lot No 11 Block 35 Bandar Penampang Phase 2b, Mile 5 1/2 Penampang Road Kota Kinabalu. The defendant contends that the plaintiffs were aware that the title deed to the property was in the possession of the third party prior to the commencement of the plaintiffs' action against the defendant by virtue of a letter dated 16 July 2009.

[8] The third party was at all material times a firm of advocates and solicitors carrying on the profession as advocates and solicitors at Kota Kinabalu, Sabah. In their defence to the defendant's third party's notice and claim, the third party denied any knowledge of any sale and purchase agreement between the defendant and the plaintiffs for the property or of any dispute between the two. The third party pleaded facts are that:

(a) there was a suit pending before the High Court at Kota Kinabalu Sabah in the form Originating Summons No K24–296 of 2002 ('the said OS') between the defendant and the landowner, and that the JV agreement and the deed of assignment were the subject matter in the said suit. The third party alleged that the deed assignment was executed without the consent of the landowner, therefore not binding on the landowner;

(b) the third party was the landowner's solicitors in the said OS and landowner had deposited the title deed to the property with the third party pending resolution of the said OS;

(c) On 8 August 2003 the High Court at Kota Kinabalu, on application by the landowner in the said OS, had ordered a stay of all further proceedings in the said suit and directed the matter to be referred for arbitration. However the defendant failed or refused to proceed with arbitration;

(d) the landowner was informed that legal fees were owing to third party and that the third party had agreed with the landowner to reduce the balance of legal fees due and owing to a sum of RM15,000;

(e) the letters are matters strictly between the third party and the landowner

and are privileged from disclosure. By virtue of the letters also the defendant was aware and knew that there are legal fees due and owing to third party by the landowner;

(f) the legal ownership of the property is still in the name of the landowner. Therefore if the defendant wants the title deed, the defendant should pay the outstanding legal fees of RM15,000 owing and due to the third party by the landowner because the third party as solicitors for the landowner has solicitor's lien over the title deed until the legal fees are fully paid.

[9] On those pleaded facts, it is the third party's defence that defendant is mere busybody and has no locus to maintain the action against the third party.

[10] On or about 25 May 2010, the third party filed an interpleader summons pursuant to O 17 r 3, O 32 r 1 and O 92 r 4 of the Rules of the High Court (RHC) 1980 by way of summon in chambers in encl 52 (p 14 of the appeal record Vol 1 part A). In the application the third party sought, inter alia, an order that the defendant pay the third party legal fees of RM20,099.18 in order to discharge the third party solicitors lien on the title deed to the property within 14 days from the date of the court order. The application was supported by an affidavit by one Cheng Ho Wah @ Roland, one of the partners in the third party legal firm (p 218 of the appeal record Vol 2 (part A)). In the affidavit in support the said Cheng Ho Wah @ Roland deposed, inter alia, as follows:

(3) This action is brought by the plaintiff against the defendant inter alia to recover the possession of the title deed held under CL215398557. However, the third party has a solicitor lien against the Title Deed held under CL215398557 arising from the Originating Summons No 24–296 of 2002 between the defendant and Syarikat Batu Bata Koidupan Sdn. Bhd. The matter was referred to arbitration by his Lordship Datuk Sulong Bin Matjerafe on 20th August 2003 but the defendant never did so. The Third Party was the solicitor acting for Syarikat Batu Bata Koidupan Sdn Bhd in that matter and therefore exercised a solicitor lien over the title deed CL215398557 for legal fees of RM20,099.18 as at 19th May 2010. The sum of RM20,099.18 as at 19 May 2010 is made up of the legal fees of RM15,000 together with interest of 8% from 16 February 2006 until 19 May 2010. The third party has informed the defendant through their solicitor dated 17th February 2006 that they are exercising their solicitor lien over the title deed. However the defendant refused to pay the third party solicitor's fees.

…

(4) The title deed held under CL215398557 is registered in the name of Syarikat Batu Bata Koidupan Sdn Bhd and was given to the third party as a result of the action filed by the defendant against Syarikat Batu Bata Koidupan Sdn Bhd in Originating Summons No 24–296 of 2002. The third party's client Syarikat Batu Bata Koidupan Sdn Bhd have not settle the

legal fees of the third party. This was informed to the defendant but they have also failed, refused and or neglected to do so.

A true copy of the letter dated 17 February 206 to Syarikat Batu Bata Koidupan Sdn Bhd, letters dated 17 February 2010 and 25 April 2006 to Messrs Ronny Cham & Co, letter dated 11 August 2008 to Messrs Ngui & Associates are now shown to me and annexed hereto marked 'CHW-2'.

(5) Accordingly I verily believe that the defendant has no cause of action against the third party claimed by the plaintiff but I have received a claim from the defendant threatening to take actions including injunction against the third party unless the third party delivers up the title deed CL215398557.

(6) I have received a copy of the statement of claim of the plaintiff against the defendant which showed at para 3 that the defendant executed a sale and purchase agreement dated 19 December 2003 which was nearly four months after the order dated 20 August 2003 in Originating Summons No 24–296 of 2002 dated 20 December 2002. Therefore the defendant had knowingly entered into the agreement with the plaintiff after they knew that were under a liability to the third party.

A true copy of the statement of claim dated 30 July 2009 from Messrs Ngui & Associates is now shown to me and annexed hereto marked 'CHW-3'.

(7) I claim no interest in the subject matter in dispute namely the title deed held under CL215398557 other than the sum of RM20,099.18 for the third party legal fees arising from Originating Summons No 24–296 of 2002. I do not in any manner collude with the plaintiff.

(8) I am ready and willing to comply with the order of this court as to custody of the title deed held under CL215398557 provided my legal fees of RM20,099.18 is first paid by the defendant and the costs of this application is also paid by the defendant.'

[11] The application was opposed by the defendant. In the defendant's affidavit in opposition affirmed by one Kong Hui Chieng opposing the application, the deponent of the affidavit deposed, inter alia, as follows:

(3) On a point of preliminary objection, I am advised by the defendant's solicitors and I verily believe that the third party's application under O 17 r 3 RHC 1980 is misconceived in that the third party has no right of claim for any charges or costs in the subject matter is dispute between the plaintiff and the defendant

(4) Notwithstanding the above preliminary objection, I have been further advised by the defendant's solicitors and I verily believe that the third party's claim of solicitor's lien against the title deed under CL No 215398557 is misconceived, vexatious, frivolous and scandalous and otherwise an abuse of the process of the court in that:

(a) By his own admission the subject matter of his claim, if any, did not

arise from the subject matter between the plaintiff and the defendant but arose from the Originating Summons No 24–296 of 2002 between the defendant herein as the plaintiff and one Syarikat Batu Bata Koidupan Sdn Bhd (BBK) as defendant, on behalf of whom the third party acted as solicitors;

(b) By his own admission the third party's solicitors' fees, if any, is owned by BBK and not the defendant;

(c) By his own admission, his claim for solicitors' fees in respect of the matter of Originating Summons No 24–296 of 2002 against BBK, even if allowable under O 17 r 3 RHC 1980, such claim is time barred;

(d) The third party has deliberately and with bad faith and intent withheld material facts from this honourable court by concealing the fact that the said Originating Summons No K24–296 of 2002 had been settled amicably out of court between the defendant and BKK and by BBK's letters dated 9 May 2003 and 13 May 2003 respectively, BBK, the third party's clients, have instructed the third party as their solicitors to re/ease amongst other titles, the said title deed held under CL No 215398557 to Messrs Ronny Cham & Co as solicitors for Aggasf Properties Sdn Bhd, the joint venture partner of BBK whilst the defendant is the assignee thereof. By his own letter dated 12 May 2003 addressed to BKK, the third party did not at all raise any issue of solicitors' lien. A copy each of BKK's aforesaid letters and the third party's letter is now produced and shown to me marked 'KCH-1', 'KCH-2' and 'KCH-3'.

(e) The third party has no right of claim for any fees even against BBK as there was neither any agreed bill of such legal fees between BBK and the third party nor any taxed bill ordered by the court.'

[12] However, having heard the parties on the interpleader summons, the Deputy Registrar of the High Court at Kota Kinabalu dismissed the application on 6 August 2010 and there is no appeal against this decision. What this means is that, the third defendant is not liable to pay the third party the outstanding legal fees due and owing to the third party by the landowner.

[13] It is pertinent to note that exh KCH1 exhibited in the defendant's affidavit in opposition is a letter dated 9 May 2003 by the landowner (who is also the defendant in the said suit) instructing the third party to release the titles to Aggasf Properties Sdn Bhd and not to the defendant though the titles were to be released through the legal firm of Messrs Ronny Cham & Co, the defendant's solicitors. In exh KCH2 the third party wrote to the landowner on 12 May 2003 seeking confirmation and further instruction on the matters raised in the landowner's letter in exh KCH1. Responding to that letter, the landowner wrote another letter exh KCH3 to the third party dated 13 May

2003 in which the landowner maintained and confirmed their earlier instruction to release the titles to Aggasf Properties Sdn Bhd through the defendant's legal firm.

[14] It is also to be noted that the title under the original title deed to the property, and the original title deed under country lease No 215398682 to lot No 11 Block 35 Bandar Penampang Phase 2b, both situate at Mile 5 1/2 Penampang Road Kota Kinabalu, Sabah are not the subject matter of the said OS between the defendant and the landowner, (see letter dated 18 June 2003 by third party to legal firm Messrs Ronny Cham & Co at p 45 of the appeal record Vol 1 part A). In the said OS the defendant was the plaintiffs and the landowner was the defendant and the said OS was filed on or about 20 December 2002; and was amended pursuant to a court order on 23 July 2003. The letter by the third party to Messrs Ronny Cham & Co was therefore written after the OS had been filed.

[15] Pursuant to the instruction by the landowner, the third party did, by letter dated 17 May 2003 (p 43 of the appeal record Vol part A), forwarded to the legal firm of Messrs Ronny Cham & Co as solicitors for the defendant all the 36 titles except title deed No CL215398597 and CL215398662.

[16] It is also apparent that with regard to the title deed No CL215398597 to the property, there was some discussions between the landowner and the third party. This is evident from the letter dated 17 February 2006 (at p 69 of the appeal record Vol 1 part A) from the third party to the landowner. In the letter, the third party referred to the said OS and the telephone conversation on 27 January 2006 with one Yusuf Razak and Kong Su Bin of the landowner. Together with the letter the third party also enclosed a letter dated 25 January 2006 from the legal firm of Messrs Ronny Cham & Co requesting for the release of the title deed No CL215398662. At the same time the third party also informed the landowner that the original title deed was in their possession and they are claiming lien on it until their fees and disbursement in the sum of RM15,000 are paid. On the same date 17 January 2006 the third party also wrote a letter at p 70 of the appeal record Vol 1 part A) to Messrs Ronny Cham & Co informing them that no instruction have been received from their client the landowner and that the third party have a lien on the original title deed CL2I5398682.

OUR OPINIONS

[17] There are two main issues in this appeal. The first issue is whether the third party has a solicitor's lien over the document of title. The second issue is whether the third party is estopped from claiming a solicitor's lien over the

document of title and accordingly res judicata applies to the third party in the light of the deputy registrar's decision dated 6 August 2010 dismissing the third party's interpleader summons.

[18] On the first issue the third party contended that the third party was engaged by the landowner as their solicitors to act in the said OS. The third party further contended that pending the resolution of the said OS, the landowner deposited the title deed for the property with the third party. It is undisputed fact that the landowner owe the third party a sum of RM15,000 as legal fees in relation to the said OS.

[19] The plaintiffs had paid the full purchase price of the property to the defendant. But the defendant has failed to deliver the document of title to the property to the plaintiffs. Hence the plaintiffs commenced the suit (Suit No K22–156–2009 III) the subject matter of the present appeal to compel the defendant to deliver the document of title to the property to the plaintiffs. In the same suit, the defendant took out a third party notice against the third party to compel the latter to produce and deliver the title deed to the property to the plaintiffs and to indemnify the defendant for any loss against liability in respect of the plaintiffs claim against the defendant in the suit.

[20] From the exchange of correspondences between the third party and the legal firm of Ronny Cham & Co, and correspondences between third party and Messrs Ngui & Associate, solicitors for the plaintiffs and correspondences between Messrs Ronny Cham & Co and Messrs Ngui & Associate it appears that Messrs Ronny Cham & Co had demanded on 24 April 2006 from the third party for the delivery of the title deed to the property. However the third party had written to Messrs Ronny Cham & Co on 25 April 2006 (at p 71 of the appeal record Vol 1 part A) reiterating that the third party were only exercising solicitor's lien on the title deed for outstanding legal fees from the landowner. However in their letters and correspondences, the third party had referred to title deed No CL215398682, not title deed No CL 215398597. We are of the view that the reference to the title deed No CL215398682 instead of title deed No CL 215398597 is an inadvertent typographical error. We think so because firstly the caption in all the letters written by Messrs Ngui & Associate, solicitors for the plaintiffs, the property has been described as Lot 3, Block 34B, Bandar Penampang Phase 2BG, (held under CL215398557, Penampang). Likewise the caption in all correspondences by the third party to Messrs Ngui & Associate also referred to the same property. Secondly, in the schedule to the sale and purchase agreement dated 19 December 2003 (at p 100 of the appeal record Vol 1 part A) between the defendant, the landowner and the plaintiffs as purchasers, the purchased property was likewise described. Thirdly, the original title deed to the property, (at pp 88–91 of the appeal record Vol 1 part A), also bear the same title No of CL 215398557.

[21] The third party was never a party either to the sale and purchase agreement between the plaintiffs and the defendant or the deed of assignment or the JV agreement between the landowner and the defendant. This fact is not in dispute.

[22] Therefore the third party argued that it has a lien over the document of title because it obtained the custody of the title deed as a result of litigation and is entitled to have custody of the same pending settlement of his legal fees. The fact that the third party was engaged by the landowner in the said OS was not in dispute. The third party letter dated 11 September 2003 (at p 181 of the appeal record Vol 2) to the landowner is the evidence that shows the third party had billed the landowner for RM 9,600 under a second interim bill (which is exhibited at p 182 of the appeal record Vol 2). The third party also wrote two letters both dated 17 February 2006 addressed to the landowner (at p 69 of the appeal record Vol 1 part A) and to the solicitors for the defendant (at p 70 of the appeal record Vol 1 part A) stating that the third party is claiming a lien over the original title deed to the property for payment of legal fees and disbursement costs in the sum of RM15,000. On 25 April 2006 the third party wrote another letter to Messrs Ronny Cham & Co, solicitors for the defendant in response to a demand for the delivery of the title deed to the property and reiterated that it could not do so because the third party is exercising a lien on the said title deed.

[23] This amount has not been paid by the landowner to the third party; and this fact is not disputed.

[24] For that reason the third party has claimed a solicitor's lien over the title deed to the property which is in their possession. We are of the view that it can do so. That is the only way the third party can protect its interest with regard to the payment of its legal fees by the landowner for services rendered to the landowner at the latter request in particular in relation to the said OS. This is particularly so when the title deed is still registered in the name of the landowner. At this juncture we noted that third party had submitted that the defendant has not compelled the landowner to deliver the title deed even though it claimed that the said OS was amicably settled. There is no rebuttal of this submission by the defendant. So probably it must be true.

[25] At common law a solicitor has a right or lien to retain property in his possession until he is paid costs due to him in his professional capacity - see para 226 *Halsbury's Laws of England* Vol 44 (4th Ed). In the same volume of Halsbury's Laws of England, at para 229 the following passage is found:

> A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client, and all persons claiming through him and having no better right than the client, until the full amount of the solicitors taxed costs payable by the client is paid.

[26] Advocates Ordinance Sabah 1953 (Sabah Cap 2) also contain s 55 which reads:

> Except by way of securing his first to a lien, an advocate shall not otherwise withhold the client's papers to the detriment of the client'

[27] Though s 55 of the Ordinance does not expressly refer to solicitor's lien over a property in possession of a solicitor, instead speaks only of withholding client's papers; we are of the view that the provision is sufficiently wide to allow a solicitor in Sabah to have a lien over a document of title belonging to a client until his legal fees are fully paid.

[28] In *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161, this court (comprising of different panel) recognizes that at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. At para 11 at p 167 of the law report, the court speaking through the judgment of Jeffrey Tan JCA (as he then was) explained this principle as follows:

> [11] Certainly, at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. A 1950 English case, *Barratt v Gough -Thomas, cited at* [1950] 2 All ER 1048, and followed in Canada (in *White Resource Management Limited v Durish* (1997) 154 DLR (4th) 158, used these words: 'The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has a right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client.' From *Re Motherwell* (1927) 62 DLR 130 (Ontario Supreme Court): 'The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which… is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications.' The right of a solicitors in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to produce them, the lien of the solicitor cannot debar them of that right. 'The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable mortgage by deposit; the lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him; although it has been held that the client can by subpoena duces tecum served on the solicitor compel him as a witness to produce them in evidence in support of the client's case.

[29] The learned judge in this instant appeal had not considered the above authorities in his judgment. In our view if he had considered the said authorities his decision could have been otherwise. On the same authorities we hold the view that the learned judge was wrong in his ruling that the third party cannot claim solicitor's lien over the title deed to the property.

[30] On the second issue, the learned High Court judge had ruled that solicitor's lien is not available to the third party because it is res judicata by virtue of the deputy registrar dismissing the third party's interpleader summons on 6 August 2010.

[31] The third party interpleader summons or application was made pursuant to O17 r 3 of the Rules of High Court 1980 ('RHC') by way of summons in chambers in the suit. In the application the third party seeks an order that the defendant to pay the third party legal fees of RM20,099.18 as at 19 May 2010 to discharge the third party solicitor's lien on the title deed to the property. But the application was dismissed by the deputy registrar on the ground that the defendant is under no liability to make payment to the third party or any other person and that there is no real foundation for the expectation of a rival claim (see the deputy registrar's grounds of decision at pp 256-263 of the appeal record Vol 3 Part B and C). Reading the grounds of decision by the deputy registrar in dismissing the third party's interpleader summons it appears that the learned deputy registrar never considered the issue whether the third has rightly claim a lien on the title deed to the property. This issue was never decided.

[32] In the case of *Letchumanan a/l Gopal (representatives for the estate of Rajammah a/p Muhusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788, cited by learned counsel for the third party it was said at p 789 that *a dogmatic approach in applying a res judicata principle would be unjust to the respondent who did not have a full and fair opportunity to litigate the issue. This factor must be made before res judicata could be binding on the parties. It is founded on justice and common sense.*

[33] On the other hand, the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, had said that *once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and all parties to the lis until its reversal on appeals.* Likewise in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, another Court of Appeal had said that *A decision given by a court at one stage on a particular matter*

or issue is binding on it at a later stage in the same suit. Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

[34] In present case however, there was no decision on the merits of the third party claim of solicitor's lien on the title deed being made by the deputy registrar in dismissing the third party's interpleader summons. Though in the excerpts of the affidavits by the third party and the defendant filed in the interpleader summons (as quoted in earlier part of this judgment) the issue of solicitor's lien on the title deed was averred to, this was not discussed or referred to in deputy registrar's ground of decision. In other words, the merits of the solicitor's lien as claimed by the third party was never at any stage determined by the court. Therefore, it is our view that the learned High Court judge had fallen into error when he concluded that the third party cannot claim a solicitor's lien over the title deed to the property as it is res judicata by reason of the deputy registrar's decision dated 6 August 2010.

[35] As for the defendant, it was argued before us that the third party should have released the title deeds to Messrs Ronny Cham & Co, the defendant's solicitors because it is un controverted fact that the third party's own client the landowner had instructed the third party to release all the 36 title deeds (which include the title deed to the property). This is evidence in exh D5 and D7 at pp 40 and 42 respectively of the appeal record Vol 1 part A.

[36] However, we are not persuaded by this argument. In our view the instruction given by the landowner to their solicitors the third party to release the title deeds does not absolve the landowner's obligation to pay the third party its legal fees and disbursement cost for services rendered. As the law stands, a solicitor is entitled to have a lien on his client documents until his legal fees and costs are paid in full.

[37] We observed that on 20 August 2003, the High Court at Kota Kinabalu had made an order on application by the defendant that all proceedings in the said OS be stayed and the matter be referred to arbitration in accordance with cl 15 of JV agreement.

[38] But the arbitration did not proceed. It appears that the parties had come to a settlement on the said OS resulting in the instruction by the landowner to the third party to release the title deeds including the title deed to the property to the solicitors for the defendant.

[39] It is to be noted that the solicitor's lien claimed by the third party on the title deeds is possessory in nature. In *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 (FC) it was said … *that a solicitor lien possessory lien is lost*

if the solicitor parts with the possession of the deeds without making any reservation. It also seems plain that the lien is preserved if the solicitor obtains the agreement of the recipient that he will hold the deeds on the solicitor's behalf.

[40] Therefore, on the facts and circumstances of this case, the third party would have lost its possessory lien on the title deeds to the property if the third party is to part with the title deed as instructed by the landowner.

[41] For the above reasons, we allowed the appeal and set aside the High Court order with costs or RM10,000 awarded to the third party/appellant.

[42] Before we sign off, we would like to say something on two other related issues raised in the submission by counsels in this appeal. The first one is the issue on privity of contract between the third party and the defendant. As we have said earlier, the third party is never a party to the JV agreement or the deed of assignment between the landowner and the developer or the sales and purchase agreement between the defendant and the plaintiffs. In this regard, we think learned counsel for the third party is correct to submit that in absence of any privity of contract between the third party and the defendant, the defendant has no right to demand the production and custody of the title deed to the property. We think the defendant has no cause of action against the third party for the release and surrender of this title deed to the property. There is of course evidence to show that the landowner (ie the third party client) had instructed the third party to release the title deed. But that is between the landowner and the third party. The defendant cannot ride on the instruction by the landowner to its client to release the title in order to have a cause of action against the third party unless the landowner is also named as a party to the claim against the third party.

[43] The second issue is that of limitation. It was submitted for the third party that the defendant's claim is time barred under Item 37 (which limitation is three years from the date of the cause of action) of the Schedule to the Sabah Limitation Ordinance or alternatively under Item 97 (period of limitation is six years) of the same. It was argued that the defendant's solicitors were aware that the third party has custody of the title deed to the property on 20 August 2003 and this knowledge, it was contended is imputed to the defendant, (see *Lee Tee @ Lee Kim Mok & Anor v Seek Lot Neo & Anor* [2000] 1 MLJ 466]. This action was filed in 2011 and therefore by virtue of either Item 37 or alternatively Item 97 of the Schedule to the Sabah Limitation Ordinance, the defendant's claim is time barred. In this regard, and bearing in mind our view in the preceding paragraph that the defendant had no cause of action against the third party for want of privity of contract, we agree with the submission by learned counsel for the defendant that the argument on limitation is inapplicable in this case.

Order accordingly.

Appeal allowed with costs.

Reported by Kanesh Sundrum